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No. 79-639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Petitioner,

v.

SIOUX NATION OF INDIANS, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MOTION AND BRIEF ON BEHALF OF AMICUS CURIAE INDIAN LAW RESOURCE CENTER

Of Counsel:

Nell J. Newton
c/o Catholic University
School of Law
620 Michigan Avenue N.E.

Steven M. Tullberg
Robert T. Coulter
Indian Law Resource Center
601 E St. S.E.
Washington, D.C. 20003

Counsel for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF
.S AMICUS CURIAE

The Indian Law Resource Center hereby moves the Court, pursuant to Rule 42(3) of its Rules of Practice, for leave to file the attached brief as amicus curiae in opposition to petitioner's effort to reverse in part the judgment below and in support of a ruling by this Court which would accord full and equal constitutional protection to all Indian interests in land. This motion and the attached brief are timely filed within the time allowed for filing of respondent's brief on the merits. Counsel for respondent has declined to consent to this filing. Petitioner, the United States, has given its written consent.

The Indian Law Resource Center is a non-profit charitable and educational organization. The Center provides legal assistance and representation to Indian people and Indian governments from various parts of the United States in a broad range of matters. The principal focus of its litigation and educational work is on the protection and support of Indian self-government. The Center attorneys regularly work and consult with many Indian leaders and Indian rights attorneys who share the Center's interest in advocating full protection for Indian interests under the Constitution and international law.

The proposed amicus brief addresses only the issue of what legal standard shall apply to the protection of Indian interests in land. No views are expressed on any other aspect of the case. The rule of law which this Court will announce on this crucial issue will have broad ramifications in United States Indian affairs. This Court's ruling will likely affect the rights of Indian peoples to the 51 million acres of land they presently hold as well as their claims pertaining to land and their legal rights in general.

The legal arguments in favor of constitutional and international law protection which are advanced by amicus are not addressed by the parties. In the view of the Indian Law Resource Center, many others providing legal assistance to Indians today, and a growing number of Indian people, these arguments are of fundamental importance and should, it is respectfully urged, be given this Court's careful consideration.

For these reasons, the Indian Law Resource Center moves that the Court grant it leave to file the annexed brief as amicus curiae.

Respectfully submitted,

Steven M. Tullberg
Robert T. Coulter
c/o Indian Law Resource Center
601 E Street, SE
Washington, DC 20003
(202) 547-2800

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES----------ii

INTEREST OF AMICUS CURIAE----------v

ARGUMENT----------1

The Interests of Indian Peoples In Their Lands Are Entitled To the Full And Equal Protection Of The Fifth Amendment To The Constitution And Of International Law----------1

Introduction----------1

The Precedents On Which The Government Relies In Its Arguments In Favor Of Broad, Extra-Constitutional Congressional Power Over Indian Interests In Land Do Not Withstand Close Scrutiny Under Present Constitutional Law And International Law----------2

1. The Cherokee Decisions of the John Marshall Court----------2
2. Lone Wolf v. Hitchcock----------7
3. Tee-Hit-Ton Indians v. United States----------9
4. Three Affiliated Tribes of the Fort Berthold Reservation v. United States----------12

Conclusion----------14

TABLE OF CASES AND AUTHORITIES

CASES — PAGE

Brown v. Board of Education, 347 U.S. 483 (1954)----------10

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)----------2,5

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)----------14

Healing v. Jones, 210 F. Supp. 125, 138 (D. Ariz 1962), aff'd 373 U.S. 758 (1963)----------10

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)----------2

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)----------7

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)--------9

Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (C.Cl. 1968)----------12

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)----------2,4

OTHER AUTHORITIES — PAGE

Burke, "The Cherokee Cases: A Study in Law, Politics and Morality," 21 Stan. L. Rev. 500 (1969)----------4

Cohen, Felix, Handbook of Federal Indian Law (1942)---------- 6

Cohen, Felix, "Indian Wardship: The Twilight of a Myth," The Am. Ind, Vol. VI, No. 4 (Summer 1953)----------6

Curtin, Philip D., Imperialism, ed. (N.Y. 1971)----------6

Foreman, Grant, Indian Removal (1932)------3

Frankfurter, F., Of Law and Life and And Other Things That Matter, 143 (1967)----------6

International Legal Authorities Pertaining to Land Rights of Indigenous People----------11,12

Otis, D.S., History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess., pt. 9 (1934)------7

Taylor, T., The States and Their Indian Citizens, U.S. Dept. of the Interior (1972)----------13

Vattel, E., The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns (Washington, 1916)----------5

Washburn, W., The Assault on Indian Tribalism: The General Allotment Act of 1887 (1975)----------7

Wilkinson & Biggs, "The Evolution of the Termination Policy," 5 Am. Ind. L. Rev. 139 (1977)----------10

William Wirt Papers (Library of Congress Manuscript Collection)--------4

INTEREST OF AMICUS CURIAE

The interest of the Indian Law Resource Center in this case arises out of our efforts to protect and advance the constitutional and legal rights of American Indians. The Center and its legal staff share this interest with other Indian rights organizations, Indian people, and non-Indians concerned about the rights of Indians. Ranked at the bottom of almost every measure of social condition, Indians need the ameliorative protection of the constitutional and legal rights which have served the interests of all other groups and individuals.

This amicus brief does not address all of the issues presented by this case. The interest of the Indian Law Resource Center does not extend to the monetary award or the attorneys's fees. The only issue which we address pertains to the law governing the relationship between the United States and the interests of Indian peoples in their lands. A fresh ruling by this Court on that important issue will have dramatic impact on United States-Indian relations for the forseeable future.

We are concerned that nothing less than a full measure of constitutional and legal protection be accorded all Indian interests. If justice is to be done, this Court must establish that the interests of Indian peoples are included squarely within the Constitution's fundamental command that all persons, regardless of race, ethnic origin or nationality, are entitled to equal protection and due process of law.

The Interests of Indian Peoples In Their Lands Are Entitled To The Full And Equal Protection Of The Fifth Amendment To The Constitution And Of International Law.

Introduction

At the core of the government's argument in the present case is the position that Indians and their lands should not be accorded the complete and equal protection of the Fifth Amendment. The government asks, once again, for this Court to deny Indians constitutional protection and to acknowledge the "plenary power" of the political branches of government. Instead of addressing the scope of Indian land rights within the context of accepted constitutional and legal norms, the government asks this Court to defer to the political authorities by rendering a decision which would in effect give unfettered power to Congress to dispose of Indian interests in land. Should the government's argument prevail, this Court would signal that Indian peoples must resign themselves to the second-class legal status which they have struggled to overcome since the founding of our nation.

The concept of constitutionally protected rights for Indian tribes or nations is a relatively recent development in United States law. For most of the history of this nation, Indians have been subject to the political and military authority of the executive and legislative branches of government. The judiciary has seldom been forceful in the exercise of its constitutional responsibility to provide a firm check and balance in Indian affairs. The plight of Indian peoples today is attributable in part to this past failure of the United States judiciary to provide the same unflinching constitutional protections to Indian interests which it has accorded all

others.

This Court should now fix the future course of federal Indian law by applying constitutional standards which will check the political winds which have in cycles eroded the land rights of Indian peoples. The present case provides an opportunity for the Court to honor the principle first eloquently expressed by Chief Justice John Marshall that law, not political expediency, shall govern how this nation deals with Indian peoples.

An examination of the cases which are most significant to the Court's review shows that the law on which the government relies is fatally infected with racially prejudiced assumptions of the past, is inconsistent with Fifth Amendment law as it has evolved to protect a broad range of interests of all other classes and individuals, and is violative of the rights of indigenous peoples as established in international law of the post-colonial era.

The Precedents On Which The Government Relies In Its Argument In Favor Of Broad, Extra-Constitutional Congressional Power Over Indian Interests In Land Do Not Withstand Close Scrutiny Under Present Constitutional Law And International Law.

1. The Cherokee Decisions of the John Marshall Court

The early Indian rights decisions of Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) and Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832) were cast in an era of rapidly increasing United States military and economic power. In the course of this development it became apparent that this young nation had not clearly resolved whether its Indian affairs would be governed by law or by

political power. The Cherokee cases are most illustrative of the early legal contests over that issue. These Marshall Court decisions provide helpful direction to the present Court's consideration of this case, the most recent manifestation of the continuing struggle between law and politics in Indian affairs.

In the early 1800's the legal rights of the Cherokees were threatened with extinction by the State of Georgia and the administration of President Andrew Jackson who pressed the cruel policy of Indian Removal against them.* The question of the nature of Cherokee legal interests in their lands was brought to this Court at a time when Jackson supported Georgia and the nullificationists in their efforts to seize all Cherokee lands.

The John Marshall Court squarely faced the enormous political pressures which were brought against the Cherokees and the Court, and it upheld the rule of law. The Court's opinions in favor of Cherokee rights rely heavily on the Constitution and on international law as expressed by Emer de Vattel and other leading scholars of that time. Although Marshall anticipated that his decision in the Worcester case would lead to a major confrontation with the nullitications and Jacksonians who stood fast against Indian rights,

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*Grant Foreman, Indian Removal (1932).

the Court did not shrink from its judicial duty.* The Marshall decision upheld Indian treaty rights and recognized Indian rights to their homelands.

> [T]he several Indian nations [exist] as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having the right to all the lands within those boundaries.
>
> 31 U.S. (6 Pet.) 556

The Marshall Court rejected the view, expressed in a separate opinion of Justice Johnson in the Cherokee Nation case, that Indians were a conquered subject people who had no ownership rights to the lands they occupied, that they were a sort of

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*Although President Jackson reportedly threatened not to enforce the Marshall Court's Worcester decision, the final legal confrontation between the Court and the President never materialized. The pro-federalist missionaries and their attorney, William Wirt, quietly arranged to accept a pardon from the Georgia governor after President Jackson reversed his position and publicly opposed nullification. The case was thereby mooted and the Cherokees were left to suffer the infamous "Trail of Tears" without further judicial protection.

Burke, "The Cherokee Cases: A Study in Law, Politics and Morality," 21 Stan. L. Rev. 500 (1969); The William Wirt Papers (Library of Congress Manuscript Collection).

tenant-at-will who were only temporarily secured in their lands pending further disposition of their rights by Congress. 30 U.S. (5 Pet.) at 27.

Viewed in its historical context, the Marshall Court's decision was a courageous and humanitarian effort to bring the governance of Indian affairs within the protection of high legal principles.

In his Cherokee opinions John Marshall did, however, adopt much of the prevailing racial theory of his time. Laced through the Court's opinions are many characterizations of Indian peoples which by today's standards are demeaning, racially prejudiced and unspeakable. The assumption of white, European racial superiority similarly infected the writings of Emer de Vattel and other great international legal theorists of the time.* The enlightened, "scientific" belief of the early 19th Century was that Indians and other non-white "natives" or "savages", were dependent "lower races" who might, possibly, through extensive training, become civilized like whites. Marshall stated that belief in Cherokee Nation:

> [Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> 30 U.S. (5 Pet.) 16

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*Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns (Washington, 1916), translated from original edition of 1758 by Charles E. Fenwick.

The guardian-ward relationship urged on this Court by the government in the present case has grown from this dictum. These same words have been echoed in many court decisions and in the legislative history of every confiscatory act passed by Congress to the detriment of Indians. As Felix Cohen* wrote, the concept of Indians as wards subject to Congressional power "is utilized in two general ways: (1) as a justification for congressional legislation in matters ordinarily within the exclusive control of the states, and (2) as a justification for federal legislation which would be considered 'confiscatory' if applied to non-Indians." Cohen, Handbook of Federal Indian Law (1942), p. 170. Every taking from Indians has been couched in terms of moral duty, for the "best interest" of the United States' Indian "wards".

By the middle of the 19th Century this idea of guardianship or trusteeship, with its emphasis on the non-competent status of the "natives", became the dominant concept in the law of the French and English colonial empires as well. The mother country's trusteeship duty to civilize and its concomitant power to limit the legal rights of its colonial subjects was the governing principle of European empires until after World War I. See, Imperialism, Philip D. Curtin, ed. (N.Y. 1971).

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*Justice Felix Frankfurter described Cohen's work as "an acknowledged guide for the Supreme Court in Indian litigation." F. Frankfurter, Of Law and Life and Other Things That Matter, 143 (1967). Among Cohen's last writings is "Indian Wardship: The Twilight of a Myth," The American Indian, Vol. VI, No. 4 (Summer 1953), pp. 8-14.

The government's argument in this case, that Indian peoples are "incapable wards", has evolved over time in tandem with this unfortunate, imperial development. It is most remarkable that the government urges again on this court a rule based on this demeaning relationship, a never-ending racial pupilage. The proposed rule would continue to justify extra-constitutional extinguishment of Indian interests in land and would leave Indians without the most important legal protections afforded to all others.

2. Lone Wolf v. Hitchcock

Lone Wolf v. Hitchcock 187 U.S. 553 (1903) was decided during the Allotment era, one of the most tragic periods of United States Indian affairs. Under the General Allotment Act of 1887, Congress had determined to "break up the tribal mass," to end Indian communal ownership of lands by forceably turning Indian families into small farmers with designated 160 acre allotments, and to thereby lead Indians to a higher level of civilization. During this era, which lasted until about 1930, two thirds of all Indian lands were taken. Designated as "surplus" lands held in "trust" by the United States, these lands were transferred to white settlers.*

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*See, e.g., D.S. Otis, History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess., pt. 9 (1934); Wilcomb E. Washburn, The Assualt on Indian Tribalism: The General Allotment Act of 1887 (1975).

Acting in what it considered at the turn of the Century to be the best interest of Indians, Congress disposed of Indian lands, Indian jurisdiction, Indian religion and culture as it saw fit, without significant interference from the judiciary. At that time in history, this United States policy was in accord with the policies of most governments of America and Europe. Such interference with the affairs of non-white peoples was widely believed to be completely consistent with Christian duty and the "white man's burden".

A review of the text of the Lone Wolf opinion and its historical context gives great support to the conclusion expressed in the concurring opinion below of Judge Nichols:

> The day Lone Wolf was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision. (p.40)

The Lone Wolf opinion gave free reign over Indian affairs to the political branches of government. Its effect was to make hollow pronouncements of the high principles of the John Marshall Court. As the dissent below states,

> The sense of the opinion seems to be that Indian tribal property is simply not protected by the fifth amendment. It may be that the thought then was that due process protects only "persons" and "private property" and that Indian tribes were not "persons" and Indian tribal property, owned communally, was not private property.
>
> ...
>
> Lone Wolf held that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation. (p. 53)

Without conceding this analysis of the holding of Lone Wolf, it is fair to state that the sense of that opinion is diametrically opposed to constitutional protection and, indeed, to almost any other legal protection for Indian interests in land. The linchpin of the Lone Wolf case is the political question doctrine. By deferring to Congress and the President, the Lone Wolf Court assured that political expedience rather than law would be paramount in United States Indian affairs.

Lone Wolf must be read today in the light of the Court's evolving standards of fairness and constitutional protection for all. The decision cannot today support the broad denial of Indian legal rights which the government urges.

3. Tee-Hit-Ton Indians v. United States

During the fifty years after Lone Wolf, several decisions involving Indian land rights were rendered by this Court, usually in litigation authorized by special jurisdictional acts which gave some limited relief to Indian peoples who were otherwise deprived of access to the courts. As noted below, these precedents are difficult to harmonize. But throughout this era the dominant legal theme remained the "sense" of Lone Wolf, the plenary power of Congress over Indian land rights.

This theme was most forcefully stated in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). This decision, rendered at the height of the Termination era, another infamous period of

anti-Indian legislation*, established that no constitutional protection attached to "Indian title" or "aboriginal title" lands. Only "recognized title" lands -- lands expressly acknowledged by Congress to be permanent Indian lands -- would receive any Fifth Amendment protection. Under the extinguishment doctrine of Tee-Hit-Ton, most Indian interests in lands became subject to arbitrary, uncompensated extinguishment by Congress. Indians living where their ancestors have lived for a thousand years would, under Tee-Hit-Ton, be deemed "no more than tenants at will of the Government." Healing v. Jones, 210 F.Supp. 125, 138 (D.Ariz. 1962), aff'd 373 U.S. 758 (1963). The minority view in the Cherokee cases seemed to prevail.

In considering the historical context of the Tee-Hit-Ton case it is instructive to recall that in 1955 the Court had just begun the monumental task of removing racial prejudice from the body of United States law. Brown v. Board of Education 347 U.S. 483 (1954). The Tee-Hit-Ton decision was an anomaly in the early stages of a legal revolution which has made due process and equal protection a present reality for millions who were previously deprived of these fundamental rights.

It is also instructive to note that Tee-Hit-Ton was decided in the twilight of the colonial era, at the inception of the post-World War II independence movement which has changed the political complexion of the world. Within a few decades one billion "colonial subjects", "natives", "aborigines" and "wards" from the "lower races" became citizens entitled to self-determination within their

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*See, e.g., Wilkinson & Biggs, "The Evolution of the Termination Policy," 5 Am. Ind. L. Rev. 139 (1977).

own nations. This rapid transformation of political relationships has been accompanied by a similarly rapid change of international law. The post-colonial world community has emphatically renounced the legal theories of Vattel and the other 18th and 19th Century scholars who gave legal sanction to the subjugation of one people by another. The legal right of self-determination, including the right to full and equal protection of the land rights of indigenous people, has supplanted the colonial trusteeship in international law.* The governing international law of

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*The United States is bound to recognize and respect the right of every individual and group to own property under article 17(1) of the Universal Declaration of Human Rights; article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, which the President signed on September 28, 1966 and submitted to the Senate for ratification on February 23, 1978; and article 21(1) of the American Convention on Human Rights, which the President signed on June 1, 1977 and submitted to the Senate for ratification on February 23, 1978. The United States is bound to recognize and respect the right of every individual to be free from arbitrary deprivation of property without compensation under article 17(2) of the Universal Declaration of Human Rights and article 21(2) of the American Convention on Human Rights. The United States has an international legal obligation to refrain from engaging in acts or practices of racial discrimination against persons or groups of persons under article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 1 of the United Nations Charter; article 26 of the International Covenant on Civil and Political Rights, which the President signed on October 5, 1977 and submitted to the Senate for ratification on

the present era is inconsistent with the Indian wardship announced in the Cherokee cases and with the denial of fair, equal legal protection seemingly approved by Lone Wolf and Tee-Hit-Ton. To the extent that those decisions relied explicitly or implicitly on the science and legal prejudice of colonial era law, they are legally insupportable today.

4. Three Affiliated Tribes of the Fort Berthold Reservation v. United States

The Fort Berthold case, 390 F.2d 686 (C.Cl. 1968), was an effort of the Court of Claims to reconcile the colonial era cases on "natives'" rights with latter 20th Century concepts of due

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(continued from previous page) February 23, 1978; and Basket I, principle VII of the Helsinki Final Act. The United States is bound to recognize and respect the right of every individual to receive equal treatment and protection under the law without discrimination as to race under article 55 of the United Nations Charter; article 26 of the International Covenant on Civil and Political Rights; article 7 of the Universal Declaration of Human Rights; Basket I, principle VII of the Helsinki Final Act; and article 24 of the American Convention on Human Rights. It is also noteworthy for the present discussion that the United Nations in 1960 expressly declared an end to the "pupilage" or trusteeship justification of European colonial empire:

> Inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence.

Declaration of the U.N. General Assembly on the Granting of Independence to Colonial Countries and Territories (December 14, 1960).

process, equal protection and fundamental fairness. That effort to reconcile these disparate views fails, and, as the dissent below states, the proposed Fort Berthold standard "makes a mockery out of the Fifth Amendment protections it purports to extend to the tribes, making its effectiveness depend on an abstract, insubstantial finding." (p. 62)

The Fort Berthold rule continues to accord only the most limited and modified constitutional rights to Indian interests in land. The political branches of the government remain largely unfettered in their control over Indian land, free to extinguish Indian interests without any but the most superficial judicial control. Under Fort Berthold, the Fifth Amendment right to just compensation is an abridged right which is ultimately subject to broad control by Congress. By simply making an "objective" record of good faith intentions to act in the best interest of Indians, Congress remains free to take Indian interests in land and to deny the just compensation to which all others are entitled. The Fort Berthold rule leaves Indian interests ripe for abuse, without sufficient judicial protection.

It is impossible to square the Fort Berthold rule with the many recent decisions of this Court governing Fifth Amendment rights. It is scarcely conceivable that the interests of Indians in land, including their interest in the 51 million acres* of lands they hold, would not today, after careful examination, be deemed property interests fully protected by due process and equal protection. It would be inconsistent and arbitrary to deny Indian

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*T. Taylor, The States and Their Indian Citizens, U.S. Dept. of the Interior (1972) p. 176.

peoples the same constitutional protections which this Court has seen fit to extend to all other groups and individuals, including aliens. Rapidly evolving notions of justice, with parallel developments in the United States constitutional law and international law, require that this Court make a fresh examination of the tenets governing Indian land law. Only those principles consistent with the highest constitutional ideals should be permitted to stand.

Conclusion

In Delaware Tribal Business Committee v. Weeks 430 U.S. 73 (1977) this Court rejected the government's argument for "plenary power" and held that "the power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." In the present case the government again asks for this Court's approval of virtually plenary political control over Indian interests in land. As in the Delaware case, this Court should deny the government's request and reaffirm the supremacy of law and the Constitution in United States Indian affairs.

Although amicus argues that this Court should rule that all Indian interests in land are fully and equally protected by the Fifth Amendment to the constitution, the Court need not decide the constitutional issues. The Court may prefer to decide on other grounds and wait to address the Fifth Amendment issues in a subsequent case where the parties have made a complete record on the constitutional questions. However, should the Court be inclined to review the central constitutional issues and to re-examine the Marshall Court decisions, Lone Wolf, Tee-Hit-Ton, Fort Berthold, and their progeny, we respectfully urge the Court to accord the highest standard of constitutional protection to all Indian interests

in land. This Court should ensure that Indian interests receive the same Fifth Amendment protections which are guaranteed to all others.

Respectfully submitted,

Steven M. Tullberg
Robert T. Coulter
Indian Law Resource Center
601 E Street, SE
Washington, DC 20003

Counsel for Amicus Curiae

Of Counsel:

Nell J. Newton
c/o Catholic University School of Law
620 Michigan Avenue, NE
Washington, DC

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